

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

76 7458

To be argued by:
PAUL J. NEWLON

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

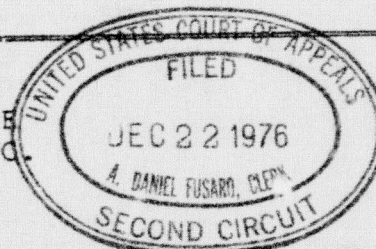
CHARLES MERRILL MOUNT,
Plaintiff-Appellant,
-against-
BOOK-OF-THE-MONTH CLUB, INC.,
Defendant-Appellee.

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P/S

On appeal from the United States District Court
for the Southern District of New York

BRIEF OF DEFENDANT-APPELLEE
BOOK-OF-THE-MONTH CLUB, INC.



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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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CHARLES MERRILL MOUNT,	:	
Plaintiff-Appellant,	:	No. 76-7458
	:	
-against-	:	
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BOOK-OF-THE-MONTH CLUB, INC.,	:	
Defendant-Appellee.	:	

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BRIEF OF DEFENDANT-APPELLEE
BOOK-OF-THE-MONTH CLUB, INC.

This is an appeal by plaintiff-appellant Charles Merrill Mount, who is appearing pro se, from a memorandum and order of the United States District Court for the Southern District of New York (Brieant, J.) issued May 20, 1976, which granted defendant-appellee Book-of-the-Month Club, Inc.'s motion for summary judgment. A copy of Judge Brieant's opinion is annexed hereto as an Appendix.* The opinion is not reported.

* This appeal is being prosecuted on the original record. Plaintiff-appellant has not filed an appendix containing the opinion of the District Court, as is required by Section 30(2) of the Rules of this Court. References to (A-) are to the Appendix annexed hereto.

QUESTIONS PRESENTED

Plaintiff Charles Merrill Mount ("plaintiff" or "Mount"), the author of a book entitled John Singer Sargent: A Biography ("plaintiff's book"), filed this suit against Book-of-the-Month Club, Inc. ("defendant" or "Book-of-the-Month"), a book club, alleging two causes of action for copyright infringement.

A. The First Cause of Action.

In the first cause of action, Mount asserts that in 1955, more than twenty years before the filing of the complaint, Book-of-the-Month received prepublication proofs of plaintiff's book so that Book-of-the-Month could determine whether to acquire the book club rights. An independent contractor engaged by Book-of-the-Month to evaluate the manuscript allegedly gave the manuscript to a third party, who allegedly published an infringing pamphlet.

The following questions are presented by the first cause of action:

1. Whether Book-of-the-Month may be held vicariously liable for the alleged independent infringement, by a third party, of plaintiff's book.
2. Whether the claim is barred by the Statute of Limitations.

The District Court concluded that Book-of-the-Month could not be held vicariously liable for the alleged infringement, and that, moreover, the claim has long been barred by the Statute of Limitations.

B. The Second Cause of Action.

In the second cause of action, Mount asserts that a book published by Harper & Row Publishers, Inc. infringed the copyright of his book. Book-of-the-Month manufactured and distributed copies of that book, as Harper's assign. All of Book-of-the-Month's manufacture and distribution of the book occurred more than three years prior to the filing of the complaint, with the exception of a remainder sale of 116 unsold copies for a total of \$551. Prior to commencing this lawsuit, plaintiff sued Harper, and in settlement of that lawsuit, plaintiff gave a general release to Harper and its assigns.

The following questions are presented by the second cause of action:

1. Whether plaintiff's claim against Book-of-the-Month, an assign of Harper, is barred by the general release which plaintiff gave to Harper and its assigns.
2. Whether the claim is substantially barred by the Statute of Limitations.

The District Court concluded that the claim is barred by the settlement and release, and that the major portion of the claim is barred by the Statute of Limitations.

STATEMENT OF FACTS

Plaintiff Charles Merrill Mount is an author and an art historian. Mount is also a very experienced p se plaintiff. As Mount has stated:

"It is well known that because of the revolutionary new methods I have introduced into art history my copyrights are the most widely infringed in the world today. Plagiaries of my books and articles have appeared not alone in the United States and England, but also in France, Switzerland, and Italy. A most unfortunate condition of the 'scholarly' world today is that my personal skill in the courts and my willingness to make use of it have become the essential means to preserve the credit of my accomplishments as historian."

(Mount Aff't., Feb. 20, 1976, ¶ 2.)

In this lawsuit, Mount asserts that Book-of-the-Month, on two separate occasions, infringed the copyright of his book, John Singer Sargent: A Biography ("plaintiff's book").

A. The First Cause of Action.

Plaintiff's first cause of action asserts that a pamphlet (the "McKibbin pamphlet") published by the Boston Museum of Fine Arts in January, 1956, as the work of David K.M. McKibbin, infringed plaintiff's book. (Compl., ¶ 4.) Plaintiff conceded (Compl., ¶ 4), and the District Court found (A-3) that Book-of-the-Month took no part in the publication of the McKibbin pam-

phlet. In addition, Book-of-the-Month never sold, promoted, or otherwise exploited the McKibbin pamphlet, never had any interest in it, and never derived any benefit from it. (Brown Aff't., Feb. 17, 1976, ¶ 5.)

Nevertheless, plaintiff seeks to hold Book-of-the-Month vicariously liable for the publication of the McKibbin pamphlet, on the basis of the following allegations. In the summer of 1955, twenty years before the filing of the complaint, Book-of-the-Month received a prepublication proof of plaintiff's book from its publisher, W. W. Norton & Company, Inc., because Norton wanted Book-of-the-Month to consider acquiring the book club rights. (A-3; Brown Aff't., Feb. 17, 1976, ¶ 2.) Book-of-the-Month gave the proof to Mrs. Pamela Taylor, an independent contractor paid ten dollars to read the book and advise defendant whether it should consider further the acquisition of book club rights. (A-3; Brown Aff't., Feb. 17, 1976, ¶ 3.) Mrs. Taylor allegedly gave the proof to McKibbin, although Book-of-the-Month did not authorize her to do so. (A-3 - A-4; Brown Aff't., Feb. 17, 1976, ¶ 4.)

McKibbin published his allegedly infringing pamphlet in January, 1956, two months after plaintiff's book was published and available for sale to plaintiff and the public in general. (A-2 - A-3; Compl., ¶¶ 2, 4, 8, Ex. A.)

Thus, Book-of-the-Month's only connection with the events complained of in the first cause of action occurred in 1955 -- when Book-of-the-Month gave Mrs. Taylor a proof of plaintiff's book for a limited, legitimate, authorized purpose.

On defendant's motion for summary judgment, the District Court viewed the facts "most favorably to plaintiff," (A-4), and concluded that Book-of-the-Month could not be held vicariously liable for the independent, allegedly tortious, conduct of Mrs. Taylor and McKibbin. The District Court also concluded that the claim was barred by the Statute of Limitations.

B. The Second Cause of Action.

Plaintiff's second claim is that, after May 1971, defendant made, advertised and sold a book by Richard Ormond entitled John Singer Sargent: Paintings, Drawings, Watercolors (the "Ormond book"), which was published in the United States by Harper & Row Publishers, Inc. ("Harper"), and that this infringed the copyright in plaintiff's book (Compl., ¶ 10) as well as plaintiff's copyright in some unidentified articles, letters and photographs (Compl., ¶ 11) and constituted "unfair trade practices and unfair competition" (Compl., ¶ 12).

As the District Court found, Harper granted and assigned to Book-of-the-Month the exclusive book club rights

to the Ormond book for a period of three years beginning April 23, 1970 (A-2). Book-of-the-Month manufactured the Ormond book for sale to its subscribers, using the original plates which had been used by Harper. The books manufactured by Book-of-the-Month list Harper as the publisher, and are physically indistinguishable from the copies which Harper manufactured for its own use. Book-of-the-Month's name does not appear on the copies of the book which it manufactured (A-2).

In the agreement by which Harper granted and assigned the book club rights to Book-of-the-Month, Harper recognized its responsibility for its publication, warranted that it did not infringe any copyright, and indemnified defendant against any claim that it did, as follows:

"HARPER & ROW, PUBLISHERS [sic] warrants that the [Ormond] book does not violate any copyright or other rights of ownership . . . and agrees to hold Book-of-the-Month Club, Inc. harmless and indemnify it from and against any claim or claims that said book violates any copyright or other rights of ownership"

(Brown Aff't., Feb. 17, 1976, Ex. 1). This, of course, was appropriate, since sales through book clubs are important extensions by publishers of the promotion and marketing of their publications, and publishers and authors derive important revenue from such sales.

Plaintiff sued Harper in the United States District Court for the Southern District of New York in 1973 for allegedly infringing his book by the publication and sale of the Ormond book, asserting against Harper in substance the same claim as is asserted against Book-of-the-Month in the instant action. Mount v. Harper & Row Publishers, Inc., 73 Civ. 3794 (LFG) (S.D.N.Y.) (the "Harper action").

Although plaintiff has repeatedly asserted (Mount Aff't., March 12, 1976, ¶ 6; Plaintiff's Brief on Appeal, at 3), that the Hon. Lee F. Gagliardi, who presided in the Harper action, "made adjudication that the so-called 'Ormond' book was a plagiary" of plaintiff's book, there was never any such ruling. In the Harper action, both plaintiff and Harper moved for summary judgment on the issue of infringement. Judge Gagliardi denied both motions, leaving the issue to be determined at trial. (Memorandum, Oct. 17, 1975.)

In denying Harper's motion, Judge Gagliardi stated that the similarities between the books were not "insubstantial as a matter of law." That, of course, was not an adjudication of infringement. It was simply a statement that the issue of infringement was one of fact, which had to be determined at trial.

Similarly, on this motion for summary judgment, there

has been no determination of whether the Ormond book infringed plaintiff's book. Because the District Court was construing the facts in the light most favorable to plaintiff, the District Court's opinion did state, as plaintiff alleged, that "the Harper book infringed the copyright of plaintiff's book." (A-3.) However, the issue of infringement was not before the District Court on Book-of-the-Month's motion for summary judgment. The basis of the motion, and of the District Court's ruling, was that the claim is barred by release, whether or not the Ormond book infringed plaintiff's book.

The Harper action was settled in December, 1975, a few days before plaintiff commenced this action against Book-of-the-Month. In consideration of \$12,500 (half paid by Harper and half by the British publisher of the Ormond book), plaintiff gave Harper and its "assigns", among others, a general release. (Schaeffer Aff't., Feb. 17, 1976, ¶¶ 5, 6.) The release contains extending language which makes it clear that it was intended to apply to Book-of-the-Month and other "assigns" of Harper. It said:

"CHARLES MERRILL MOUNT . . . releases and discharges [HARPER & ROW PUBLISHERS, INC.] the RELEASEE, RELEASEE'S heirs, executors, administrators, successors and assigns from all actions, causes of action . . . claims, and demands whatsoever, . . . which against the RELEASEE, the RELEASOR . . . hereinafter can, shall or may, have for, upon, or by reason of any matter, cause or thing whatsoever from the beginning of the world to the day of the date of this RELEASE,

including without limiting the foregoing in any way, any which have arisen or may yet arise out of past or future publishing, printing, distributing, selling or licensing by the Releasee, or by its successors and assigns, of all or any portion of the book entitled, JOHN SINGER SARGENT by Richard Ormond, published by PHAIDON PRESS, LIMITED of Great Britain in 1970, and any future edition thereof or subsidiary rights in connection therewith.

Nothing in this release shall bar the Releasor from bringing or maintaining any manner of action, cause of action or suit whatsoever against Richard Ormond."

(Schaeffer Aff't., Feb. 17, 1976, Ex. C) (Emphasis added).

Significantly, the release expressly reserved plaintiff's right to sue Ormond, but no one else.

The District Court concluded that this release barred the claim against Book-of-the-Month, whose only alleged infringing actions were done pursuant to an assignment from Harper. (A-6.)

The District Court therefore granted summary judgment to defendant Book-of-the-Month on both claims, and dismissed the complaint.

ARGUMENT

I

PLAINTIFF'S FIRST CAUSE OF ACTION IS BARRED BY THE STATUTE OF LIMITATIONS AND, MOREOVER, FAILS TO ALLEGE AN INFRINGING ACT

The District Court properly concluded that Mount's first claim -- based on the 1956 McKibbin pamphlet -- was both barred by the Statute of Limitations, and legally insufficient to impose liability on Book-of-the-Month. (A-3 - A-4.)

A. The Statute of Limitations Bars the Claim.

The only act of the defendant complained of in plaintiff's first cause of action occurred over 20 years before the filing of the complaint on December 29, 1975, and the claim is therefore barred by the three-year Statute of Limitations. Copyright Act of 1947, 17 U.S.C. § 115(b).*

The only "infringing" act alleged in the first cause of action is that in 1955 Mrs. Taylor gave a proof of plaintiff's book to McKibbin, who infringed plaintiff's copyright in a pamphlet published in 1956.

It seems clear that plaintiff attempts to assert a

* "Civil actions. -- No civil action shall be maintained under the provisions of this title unless the same is commenced within three years after the claim accrued." The same Statute of Limitations is contained in the Copyright Act of 1976, 17 U.S.C § 507(b), which is not yet in effect.

claim of infringement of his statutory copyright. While he refers to "common law copyright" in paragraphs 4 and 5 of the complaint, he alleges in paragraph 1 that the action "arises under U.S.C. Title 17." He alleges that his book was published in November 1955 (Compl., ¶ 7) and that the McKibbin pamphlet was published later, in January 1956 (Compl., ¶ 4). Thus, he must be claiming that his statutory copyright was infringed. This is borne out also by his reference in paragraph 16 to 17 U.S.C. § 115(b) in relation to both causes of action. In any event, the period of limitations under the New York Civil Practice Law and Rules, CPLR § 214, which would be applicable to a claim for infringement of common law copyright, is also three years.

While plaintiff acknowledges that Book-of-the-Month's only contact with the subject matter of the first cause of action occurred in 1955 (Plaintiff's Rule 9(g) Statement, ¶¶ 2, 6; Mount Aff't., Feb. 20, 1976, ¶ 19), plaintiff presents two theories why the first cause of action should not be barred by the Statute of Limitations. Both of these theories were presented to the District Court, and were rejected. (Plaintiff's Memorandum in Opposition, Feb. 23, 1976.) First, plaintiff argues that he only learned of McKibbin's alleged access to his manuscript in 1974, and that therefore the Statute of Limitations should be tolled because the facts on which he bases his claim for copyright infringement had been "concealed". (Plaintiff's

Brief on Appeal, at 10.) Second, plaintiff contends that the Boston Museum of Fine Arts continues to sell the McKibbin pamphlet, and that this continued sale places the last allegedly infringing act in the period not time-barred. (Plaintiff's Brief on Appeal, at 11.) Neither of these theories has any basis in law.

- (1) Plaintiff's failure to discover a claim does not toll the Statute of Limitations, in the absence of fraud.

Even if plaintiff only learned of McKibbin's access to his manuscript in 1974, the McKibbin pamphlet has been openly sold since it was published in January, 1956 (Compl., ¶¶ 4-5).

To toll the Statute of Limitations for copyright infringement,

"plaintiff must show both successful concealment of the cause of action and fraudulent means to achieve that concealment."

Prather v. Neva Paperbacks, 446 F.2d 338, 341 (5th Cir. 1971). Plaintiff here has shown neither. Plaintiff was aware in January, 1956 of the publication of the McKibbin pamphlet,* and could have easily obtained a copy of the McKibbin pamphlet

* This is clear because plaintiff claims that in 1974 he had known about the McKibbin pamphlet for nineteen years. (Plaintiff's Brief on Appeal, at 11; Plaintiff's Memorandum in Opposition, first paragraph of discussion entitled "The First Cause of Action").

then. We suppose he did. As in Prather, supra, in which the plaintiff's claim that he had been unable to obtain a copy of an allegedly infringing work was held not to toll the Statute of Limitations, plaintiff was on inquiry that he had a potential claim when he learned of the publication of the allegedly infringing work.

"In essence, the plaintiff suspected that he had a cause of action, but could not prove the infringement. . . . Such a showing is insufficient to toll the statute of limitations.

. . .

Defendant is not required to wait until plaintiff has started substantiating its claims by the discovery of evidence. Once plaintiff is on inquiry that it has a potential claim, the statute can start to run. . . . This standard is in line with the modern philosophy of pleading which has reduced the requirements of the petition and left for discovery and other pretrial procedures the opportunity to flesh out claims and to define more narrowly the disputed facts and issues."

Id. at 341.

Had the plaintiff pursued his purported claim against McKibbin in 1956, he could easily have found out, through discovery, whether, and if so, how McKibbin had obtained access to plaintiff's book. The fact that plaintiff did not find out this information until 1974 was not due to fraudulent concealment, but rather to plaintiff's own failure to pursue his claim.

- (2) A possible independent infringing act, within the last three years, does not remove the bar of the Statute of Limitations as to Book-of-the-Month.

Plaintiff's second theory for tolling the Statute of Limitations -- that the "last infringing act" occurred within the past three years -- is similarly without foundation.

Plaintiff claims that the McKibbin pamphlet has been sold by the Boston Museum of Fine Arts within the period not time-barred. (Mont Aff't., Feb. 20, 1976, ¶ 24.) However, the museum's continued sale of the pamphlet would not remove the bar of the Statute of Limitations to a suit against Book-of-the-Month. Plaintiff has not alleged that Book-of-the-Month participates in the continued sale in any way, or derives any profits therefrom. Even if Book-of-the-Month had taken an active role in the publication of the pamphlet -- which it did not -- the continued sale by the museum could not be attributed to Book-of-the-Month. Maloney v. Stone, 171 F. Supp. 29, 32 (D. Mass. 1959).

The factual situation in Maloney v. Stone, supra -- in which summary judgment was granted to the defendant -- is analogous to the case at bar. In Maloney, plaintiff sought to hold a manufacturer of an allegedly infringing work liable for damages more than two years (the period of the applicable Statute

of Limitations) after the manufacturer had turned over all copies of the infringing work to his customers. The plaintiff's theory was that the manufacturer remained liable as long as the customers continued to sell the infringing work. Judge Wyzanski rejected this claim, holding that when the manufacturer turned over the last of the copies and terminated his contract with his customers, it

"ceased to infringe, if it ever did infringe, ceased to invade plaintiff's interest, if it ever had invaded plaintiff's interest. . . . What [the customers] did with the products of [the manufacturer] they did on their own account and entirely on their own responsibility."

Id. at 32.

Similarly, in the case at bar, even if the McKibbin pamphlet were still being sold at the Boston Museum of Fine Arts, the museum and McKibbin would be doing that "on their own account and entirely on their own responsibility."

The District Court thus properly concluded that plaintiff's first claim is barred by the Statute of Limitations.

B. The Acts Alleged Do Not Constitute Copyright Infringement.

Not only is the first cause of action barred by the Statute of Limitations, but, as the District Court found:

"there is no evidence proffered by plaintiff on this motion which would impose legal responsibility on this defendant for the unrelated, tortious conduct of Mrs. Pamela Taylor, who

was not defendant's employee, and did not work under its supervision or control."

(A-3 - A-4).

Viewing the affidavits most favorably to the plaintiff (A-4), the District Court found that Book-of-the-Month merely gave a proof of plaintiff's book to Mrs. Taylor, an independent contractor paid ten dollars to read the book, who, exceeding her authority, gave the proof to McKibbin.* Plaintiff alleged that McKibbin then published his pamphlet, infringing plaintiff's book.

As the District Court found, there is no basis for holding Book-of-the-Month liable for McKibbin's alleged, independent infringement.

"It is clear that before one may be held liable as a vicarious infringer, absent a special relationship, such as agency or partnership, he must have had the right and ability to supervise the infringing activities, as well as a direct financial interest in those activities."

Roy Export Co. Establishment v. Trustees of Columbia University, 344 F. Supp. 1350, 1352 (S.D.N.Y. 1972).

* Plaintiff conclusorily contended that Mrs. Taylor was authorized to give the manuscript to McKibbin. The only support for this contention which plaintiff has advanced is that Mrs. Taylor was the wife of the director of the Metropolitan Museum of Art, and therefore must have had great responsibility at Book-of-the-Month. (Mount Aff't., March 12, 1976, ¶¶ 21-22). Plaintiff thus produced "no real support" for his version of the facts. Dressler v. MV Sandpiper, 331 F.2d 130, 134 (2d Cir. 1964), approved in Heyman v. Commerce and Industry Insurance Co., 524 F.2d 1317, 1319 (2d Cir. 1975).

It is evident from the face of the complaint, as well as defendant's moving papers, that Book-of-the-Month neither had any financial interest in, nor had the right nor ability to supervise, the publication or sale of the McKibbin pamphlet. Plaintiff's affidavits and other papers have not contended otherwise.

Moreover, the complaint does not allege, and plaintiff produced no evidence to show, that Book-of-the-Month knew or had any reason to believe that McKibbin contemplated an infringing use of plaintiff's book. In fact, it did not. Absent such allegations and proof, summary judgment was properly granted to Book-of-the-Month. Harper v. Shoppell, 26 F. 519 (C.C.S.D.N.Y. 1886).

Plaintiff has now contended, on this appeal, that Book-of-the-Month should be held vicariously liable for McKibbin's alleged infringement, even if Book-of-the-Month did not authorize Mrs. Taylor to give McKibbin the manuscript, on the grounds that Book-of-the-Month had a "duty of care" to protect the manuscript. This contention is without basis in law. In addition, if plaintiff is arguing that Book-of-the-Month facilitated the publication of the McKibbin pamphlet, the claim contradicts the facts set forth in the complaint, and found by the District Court. The McKibbin pamphlet, according to the complaint, was published in January, 1956 -- two months after the publication of plaintiff's book. (A-2 - A-3). Whether or not defendant was the source of McKibbin's copy of

plaintiff's book is thus immaterial. McKibbin could as easily have purchased plaintiff's published book before he published his pamphlet.

The District Court correctly granted summary judgment to Book-of-the-Month on plaintiff's first cause of action.

II

PLAINTIFF'S SECOND CAUSE OF ACTION
ASSERTS A CLAIM FOR WHICH PLAINTIFF
HAS RECEIVED FULL COMPENSATION, AND
WHICH IS BARRED BY A RELEASE

Plaintiff has already received full compensation for his second claim -- based on Book-of-the-Month's distribution of the Ormond book -- and the claim is barred by a release.

A. The Claim Is Barred By a Release.

Book-of-the Month manufactured and sold copies of the Ormond book as Harper's assign, under an agreement which gave Book-of-the-Month exclusive book club rights to the book for a period of three years from April 23, 1970. The 2,000 copies manufactured by Book-of-the-Month* were identical to those manufactured by Harper; they listed Harper as the publisher and were part of, not in addition to, the copies published by Harper. (A-5; Brown Aff't., Feb. 17, 1976, ¶¶ 6-8.)

As noted above, prior to commencing this lawsuit, plaintiff sued Harper, alleging the same claim which is here asserted as the second cause of action. Mount v. Harper & Row Publishers, Inc., 73 Civ. 3794 (LFG) (S.D.N.Y.). In return for payment of \$12,500, the plaintiff released Harper and its assigns (and the British publisher and its assigns) from any liability for past or future publishing of the Ormond book (A-3, A-5; Schaeffer Aff't., Feb. 17, 1976, Ex. C).

* Plaintiff has asserted (Plaintiff's Brief on Appeal, at 7) that Book-of-the-Month manufactured 10,000 copies, but that is incorrect.

That payment was intended to compensate fully the plaintiff for all of his damages for which Harper and its assigns may be liable, growing out of Harper's publication of the Ormond book (A-5). Thus, the claim plaintiff advances here is part of a claim for which plaintiff has received full compensation. As the Second Circuit has held,

"Copyright infringement is in the nature of a tort. . . . Under elementary principles of tort law a plaintiff is entitled to only one recovery for a wrong."

Screen Gems-Columbia Music, Inc. v. Metlis & Lebow Corp., 453 F.2d 552, 554 (2d Cir. 1972).

To allow the plaintiff to proceed with this claim would be to allow the plaintiff to seek double compensation.*

* Plaintiff's own calculation (Plaintiff's Brief on Appeal, at 7-9) that he would be entitled to more than \$200,000 in damages seems based on a misreading of the relevant section of the Copyright Act of 1947, 17 U.S.C. § 101. Plaintiff claims that the statute would provide for minimum damages of \$250 for each passage of the Ormond book which infringed his book, in addition to actual damages. To the contrary, the statute provides that, upon proving infringement, plaintiff could recover in lieu of actual damages, one dollar for every copy of the infringing book, but not more than a total of \$5,000. The amount of statutory damages is not affected by the number of infringing passages. Thus, if plaintiff had proved infringement, and if he chose to receive statutory damages in lieu of actual damages, he would have received a total of \$5,000 -- less than half of what Harper and Phaidon Press, Ltd., paid him in settlement. See Frederick Chusid & Co. v. Marshall Lehman & Co., 326 F.Supp. 1043, 1064 (S.D.N.Y. 1971). The Copyright Act of 1976, which is not yet in effect, provides statutory damages in lieu of actual damages with a maximum of \$10,000 for infringement with respect to one work, regardless of how many passages are allegedly infringed. 17 U.S.C. § 503(c).

Plaintiff contends, on this appeal, that he should not be bound by the release which he gave to Harper, because, he says, it is broader than language used by Judge Gagliardi during the settlement hearing in the Harper action. (Plaintiff's Brief on Appeal, at 17). This contention is without merit.

As the District Court found, plaintiff was well aware -- at the time he signed the release -- that the release reserved plaintiff's right to sue Ormond, and no one else (A-6 - A-7). The District Court properly held that if there were ambiguous statements, during the settlement hearing, about the form of the release, they were merged in the release given to Harper and its assigns, including Book-of-the-Month, at a later date. (A-5).

Knowing that he had signed the release, plaintiff consented to a discontinuance with prejudice of the Harper action, thus accepting the money which Harper gave him as full settlement of his claims.* Plaintiff is thus bound by the release.

* Pursuant to Judge Gagliardi's request at the settlement hearing, for the convenience of the Court, the stipulation of discontinuance was signed the day of the hearing, December 3, 1975. Judge Gagliardi informed Mount that he would wait two weeks before filing the stipulation of discontinuance, and that if the settlement was not amicably concluded in that time, he would "tear up" the stipulation, and not file it. The stipulation of discontinuance was not filed until December 19, 1975 -- a full week after Mount signed the release. (Schaeffer Aff't., Feb. 17, 1976, Ex. B at 4). Mount's contention (Plaintiff's Brief on Appeal, at 2) that he consented to the discontinuance before signing the release is thus frivolous. Had Mount thought that he was "tricked" into signing the release, he could have simply informed Judge Gagliardi, and the Harper action would not have been discontinued. (A-6)

Moreover, the release is fully consistent with the intent of the parties at the settlement hearing. As the settlement minutes make clear, the settlement and release was intended to free Harper's past and future publication from all claims by Mount for past or future infringement. (Schaeffer Aff't., Feb. 17, 1976, Ex. B). Harper's exploitation of the Ormond book included the utilization of assigns, such as book clubs. Mount agreed in the settlement discussions that

"None of this would be with any prejudice to Mr. Mount's claim against Ormond, but this \$12,500 is, in effect, a purchase of Mr. Mount's approval with respect to those two corporate defendants [Harper and Phaidon Press, Limited]."

(Schaeffer Aff't., Feb. 17, 1976, Ex. B. at 3).

Indeed, as part of its continued right to exploit the Ormond book, Harper could again assign book club rights -- free from any claim by Mount. Mount agreed at the settlement hearing that

"[Harper and Phaidon Press, Ltd.] would expect to continue selling the Ormond book in consideration of the \$12,500 [they] are paying, and if for some reason they wish to reprint the book, that they would be able to do so, also."

(Id. at 3).

Plaintiff rests his argument (Plaintiff's Brief on Appeal, at 16) on the fact that Judge Gagliardi stated, earlier in the settlement hearing, that the plaintiff was reserving his "right to proceed against Mr. Ormond or anyone else that [he]

may desire to proceed against." (Schaeffer Aff't., Feb. 17, 1976, Ex. B at 2). However, immediately after Judge Gagliardi made that statement, Mount agreed, as noted above, that the settlement was intended to be an "approval" of Harper's publication of the Ormond book.

If the phrase "anyone else" had created any ambiguity about the fact that Mount was giving up his right to sue all those -- such as Book-of-the-Month -- who merely participated in Harper's publication, that ambiguity was immediately eliminated by Mount's explicit agreement that he was freeing Harper and, necessarily, those who merely participated in Harper's publication, from all claims for past or future infringement.

The settlement and release given to Harper would be frustrated if plaintiff were left free to sue others, like Book-of-the-Month, whose only alleged act of infringement was that they manufactured or sold copies of the Ormond book as an assign of, and under an agreement with, Harper, the publisher. The defendant's acts were truly part of Harper's publication.

This is highlighted by the fact that, as part of its agreement with Book-of-the-Month, Harper agreed to indemnify Book-of-the-Month against claims that the Ormond book violated any copyright. In recently construing an almost identical indemnity agreement, this Court held that a hardback publisher which had indemnified a paperback publisher against claims of copyright infringement was "for all practical purposes. . . the

real party in interest" in an infringement suit against the paperback publisher. Meeropol v. Nizer, 505 F.2d 232, 236 (2d Cir. 1974). Thus, by operation of the indemnity agreement in the case at bar, Harper is the real party defendant, ultimately liable in this lawsuit with respect to the second cause of action.

Furthermore, Mount's contention that Harper's attorneys knew that he intended to sue Book-of-the-Month is wholly unsupported. (Plaintiff's Brief on Appeal, at 20). Mount presented a single argument in support of that contention (Mount Aff't., Feb. 20, 1976, ¶39):

"It was well known to all parties that at all times plaintiff intended to bring separate proceedings against BOOK OF THE MONTH CLUB following successful conclusion of his action against Harper. Plaintiff had signaled this intention at an early stage by employing INTERROGATORIES served upon Harper to gather evidence necessary for such further proceedings, and in particular, in INTERROGATORIES served September 22, 1973, plaintiff propounded as number 6: (EXHIBIT E)

What was the year, month and day of month, Defendant alleges The Book of the Month Club made its last direct mail offering of the Ormond book?"

The serving of these interrogatories certainly did not inform Harper or its attorneys that plaintiff intended to sue Book-of-the-Month separately. Interrogatories in one lawsuit may not properly be used to discover facts for the purpose of bringing another lawsuit against a different defendant. Rather, interrogatories are limited to

"any matter, not privileged, which is relevant to the subject matter involved in the pending action. . . ."

Rule 26(b), Fed. R. Civ. P. (emphasis added), applied to interrogatories by Rule 33, Fed. R. Civ. P. See Prudential New York Theatres, Inc. v. Radio City Music Hall Corp., 47 F.R.D. 533 (S.D.N.Y. 1969).

Far from telegraphing his intention to sue Book-of-the-Month in a separate action, Mount's service of these interrogatories must have been seen as a sign of his intent to hold Harper liable, as publisher, for all of the damages which Mount allegedly sustained as a result of Harper's publication of the Ormond book. Because Book-of-the-Month distributed copies of the Ormond book as an assign of Harper, an interrogatory addressed to the extent of Book-of-the-Month's distribution is a proper question to discover what damages plaintiff sustained as a result of Harper's publication.

Mount's reservation of his right to sue Ormond is, of course, quite different. The infringement with which the plaintiff apparently charges Ormond was prior to, and independent of, Harper's publication of the Ormond book. A copyright infringement suit by Mount against Ormond -- even if successful -- would in no way interfere with the continued publication of the Ormond book, by Harper and its assigns, with Mount's "approval" under the settlement. In contrast, suits by Mount against those -- like Book-of-the-Month -- whose acts were merely part of Harper's publication of the Ormond book would totally negate the "approval"

under the settlement.

The District Court properly concluded that Mount's second cause of action is barred by the release which he gave to Harper and its assigns (A-6).

B. The Claim Is Substantially Barred
by the Statute of Limitations.

Even if Mount's second cause of action were not barred by release, the major portion of the claim would be barred by the three-year Statute of Limitations, 17 U.S.C. § 115(b). (A-7).

As Judge Gurfein held in Rosette v. Rainbo Record Manufacturing Corp., 354 F.Supp. 1183, 1194 (S.D.N.Y. 1973), the Statute of Limitations for copyright infringement prohibits recovery of damages for any infringing act that occurred more than three years prior to the filing of the complaint. For example, where a plaintiff claims infringing sales made over a period of time, some more than three years prior to the suit and some less than three years prior thereto, the plaintiff is entitled to damages arising only out of the later sales. The earlier ones are time-barred.

All of the manufacture, promotion, and regular sales of the Ormond book by Book-of-the-Month occurred more than three years before the filing of the complaint on December 29, 1975. (Brown Aff't., Feb. 17, 1976, ¶¶ 9-11). The only sale by Book-of-the-Month of the Ormond book within the period not time-barred was a remainder sale of the last 116 unsold copies, at \$4.75 per copy, to Marboro Bookshops Corporation on February 16, 1973. The gross proceeds of that sale were \$551. (Id.).

Even if the claim were not barred in its entirety, Book-of-the-Month would be entitled to summary judgment dismissing that portion of the claim which seeks damages for the period of time barred by the Statute of Limitations. Skouras Theatres Corp. v. Radio-Keith-Orpheum Corp., 193 F.Supp. 401, 407-408 (S.D.N.Y. 1961); United States v. General Electric Co., 209 F.Supp. 197, 212 (E.D. Pa. 1962).

CONCLUSION

For the foregoing reasons, the judgment of the District Court should be affirmed.

Dated: New York, New York
December 20, 1976

Respectfully submitted,

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(212) 644-8000

Attorneys for Defendant-Appellee
Book-of-the-Month Club, Inc.

Paul J. Newlon
Richard M. Zuckerman

Of Counsel

APPENDIX

PAGINATION AS IN ORIGINAL COPY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- -X

CHARLES MERRILL MOUNT,

Plaintiff,

-against-

BOOK-OF-THE-MONTH CLUB, INC.,

Defendant.

----- -X

Pro Se 75 Civ. 6474-CSH

MEMORANDUM AND ORDER

1/4/47

Brieant, J.

By his Pro Se complaint filed December 29, 1975, and initially assigned to me, plaintiff pleads two causes of action. Defendant's motion for summary judgment was heard on March 19, 1976 and decision reserved. Thereafter, effective May 3, 1976, the action was reassigned to Judge Haight of this Court pursuant to IAC Rule 10.

Since the motion had been fully submitted before me and was held sub judice at the time of the reassignment, Judge Haight has agreed that it is appropriate for me to render the decision thereon.

There are no controverted factual issues. For the reasons set forth below, summary judgment is granted.

BEST COPY AVAILABLE

Defendant is what its name implies. It publishes books under license, which are sold by mail to its members, who may select from monthly lists of selections and alternate selections recommended by the Club. The books are newly published popular selections, which the Club obtains by license from major book publishers. It manufactures the requisite number of copies, usually from the original plates of the major publisher. A copy of a book issued by the Book-of-the-Month Club is physically indistinguishable from a copy of the same book sold through book stores by the initial publisher.

Harper & Row Publishers, Inc. ("Harper"), prior to April 1970, published a book entitled "John Singer Sargent: Paintings, Drawings, Watercolors" by Richard Ormond (the "Ormond book"). By written agreement, Harper, on April 23, 1970, granted and assigned to this defendant the exclusive Book Club rights to the Ormond book for a period of three years. Defendant manufactured the Ormond book for sale to its members, in form identical to the book manufactured by Harper, with Harper's name appearing thereon.

Plaintiff Charles Merrill Mount, a recognized authority on the works of John Singer Sargent, had published on November 8,

1955 his own book entitled "John Singer Sargent: A Biography." The Harper book infringed the copyright of plaintiff's book. In 1973 plaintiff brought an action in this Court to recover damages and for injunctive relief arising out of this infringement. (Mount v. Harper & Row Publishers, Inc., 73 Civ. 3794-LPG). This litigation, hereinafter referred to as the Harper action, was settled and discontinued by Court order dated December 17, 1975, made on consent, under circumstances detailed below.

Plaintiff's first claim pleaded in this case asserts that jurisdiction arises under Title 17 of the United States Code, and pleads that Mrs. Pamela Taylor, a reader "employed by defendant", secured a copy of the proofs of plaintiff's book in the Summer of 1955 and gave the proofs to one McKibbin, not a party to this litigation, who infringed plaintiff's common law copyright in the unpublished proof of the book, by means of a pamphlet published in January 1956 by the Boston Museum of Fine Arts, also not a party to this action.

As to the first claim, there is no evidence proffered by plaintiff on this motion which would impose legal responsibility on this defendant for the unrelated, tortious conduct of Mrs.

Pamela Taylor, who was not defendant's employee, and did not work under its supervision and control. Rather, it appears clearly that Mrs. Taylor was an independent contractor, retained for the limited purpose of reading plaintiff's pre-publication galleys in her home for \$10.00, to express an opinion as to its value. Defendant used a number of such readers to perform this service, and, for a fixed fee, to give their largely subjective views on the books read. Defendant used this information as a market study, to decide whether to seek a book club license for a particular book. Mrs. Taylor did not recommend plaintiff's book, and it did not become a publication of defendant.

Viewing the affidavits most favorably to plaintiff, there is no basis for imposing vicarious liability on this defendant, if, as alleged, Mrs. Taylor made the proofs available to an independent infringer, McKibbin. In addition, the first claim is barred by the three-year statute of limitations. 17 U.S.C. §115(b).

The second claim pleaded here alleges that defendant infringed plaintiff's copyright by its publication of the Ormond book pursuant to its 1970 license taken from Harper, previously mentioned.

It is clear that this defendant published the infringing Ormond book as an assignee, licensee and successor in interest of Harper. Indeed, on April 23, 1970, when Harper sold exclusive Book Club rights to defendant for three years, it warranted its own assignors' copyright and indemnified defendant against claims such as this.

Prior to commencing this action, plaintiff settled and discontinued the Harper action before Judge Gagliardi of this Court, in return for a substantial cash payment from Harper. On December 12, 1975 he acknowledged and delivered to Harper a general release which by its terms includes Harper's "successors and assigns," one of which this defendant is. The only reservation in the form of release is the right to sue Ormond.

This release constitutes an absolute bar to the second claim. It is true that earlier comments on the record before Judge Gagliardi on December 3, 1975 in the Harper case, as to plaintiff's intentions to sue "Mr. Ormond or anyone else" after settlement of the Harper action, are somewhat ambiguous, but all of these discussions must be deemed merged in the form of the general release, given at a later date.

The proceedings before Judge Gagliardi resulting in plaintiff's agreement to settle his litigation against Harper contemplated that a written release would be given. Plaintiff concedes (§49 of his February 20, 1976 affidavit) he knew, when he signed the Harper release, that it was broader in form than his claimed understanding of the settlement agreement negotiated before Judge Gagliardi. So knowing, he signed. If, as he now claims, he was overreached or "tricked" by Harper's attorneys, then his proper remedy would have been to seek judicial reformation of his release as soon as he discovered that he had been "tricked," or move before Judge Gagliardi to vacate the order which discontinues the Harper litigation with prejudice. Possibly an independent action might lie to reform the instrument, but it is hard to see how reformation can be obtained when the aggrieved party concedes that he knew at the time he was signing the release that it was broader in scope than his understanding of the settlement, and then some five (5) days later, he signed the consent to the order of discontinuance.

Plaintiff is an articulate, intelligent pro se litigant who, by his own affidavit, shows that he knowingly signed the more precise form of release tendered to him, in order to receive Harper's

money, thereby limiting himself to suing only Ormond. It is unreasonable to assume that Harper, advised by counsel, intended to pay twice, once in its own lawsuit, and again, here, as indemnitor of this defendant. Plaintiff concedes that he knew as early as October 31, 1973 that this defendant was selling Harper's book pursuant to Harper's authority (Affidavit of Charles Merrill Mount, sworn to February 20, 1976).

Furthermore, except for a sale of remaindered copies amounting to \$551.00, made by Book-of-the-Month Club to Marboro Books, Inc. in 1973, the second claim pleaded is also substantially barred by the aforementioned three-year statute of limitations.

The Court declines to award counsel fees as requested on this motion. We are reluctant to penalize a pro se litigant whose claim would have merit but for the statute of limitations and the release, and would regard the award of counsel fees under these circumstances as unduly inhibiting access to the Courts.

The Clerk of this Court shall enter judgment pursuant to Rule 58(1), F.R.Civ.P. that all relief shall be denied.

So Ordered.

Dated: New York, New York
May 20, 1976

CHARLES L. BRIANT
U. S. D. J.

AFFIDAVIT

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

Richard M. Zuckerman, being duly sworn, deposes
and says:

I am not a party to the action, am over 18 years
of age and reside at 215 West Tenth Street, New York, New York
10014.

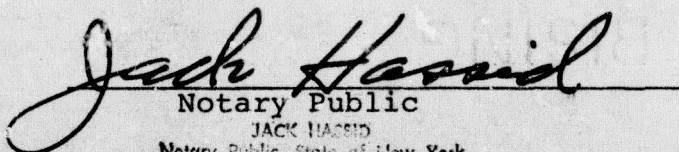
On December 21, 1976, I served three (3) copies
of the attached Brief of Defendant-Appellee Book-of-the-Month
Club, Inc., upon the plaintiff, who is proceeding pro se, at the
address designated by him for that purpose:

CHARLES MERRILL MOUNT
230 Beach 146 Street
Neponsit, New York 11694

Said service was made by depositing true copies of
the attached Brief enclosed in a postpaid properly addressed
envelope, in an official depository under the exclusive care
and custody of the United States Postal Service within the
State of New York.



Sworn to before me this
22nd day of December, 1976


Notary Public
JACK HASSID
Notary Public, State of New York
No. 21-1704205
Qualified in New York County
Commission Expires March 30, 1977